IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1169 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

DAMJI DEVSI LOHANA

Appearance:

1. Criminal Appeal No. 1169 of 1994

MS B.R.GAJJAR, APP for Appellant-State

..... Respondent No. 1 Served

MR NITIN M AMIN for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 06/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

This appeal, which is filed under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short), is directed against the judgement and order dated August 17, 1994 rendered by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 356 of 1993 acquitting the respondents/original accused Nos. 1 & 2 ('Accused' for short) of the offences punishable under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short).

2. The basic facts required for disposal of this appeal are as under:

2.1 On August 17, 1993, B.A.Tewari, Police Inspector of D.C.B. Rajkot received an information that two persons who were sitting near Anand Pan House on Sant Kabir Road, Rajkot were doing the business of charas by keeping with them. Out of them, one was wearing white Jhabha-Lehanga and spectacles and second person was wearing white full sleeved bush-shirt and khakhi coloured pantaloon. On the basis of the information, B.A.Teweari, P.I. called two panchas, who were explained with regard to the said information, and accordingly, first panchnama was prepared. Thereafter, all the panchas and other police personnel, with the material of sealing the article, which was to be recovered, went to the said place in the police jeep. When they reached near the Anand Pan House, the said two persons who satisfied the description of the persons were found with the bags in their hands. Both were trapped in the presence of the panchas and interrogated. They have given their names as Damjibhai Devsibhai Luvana and Mohanbhai Babubhai Patel respectively. Thereafter, in the presence of panchas, B.A.Tewari, P.I. and the other members of the raiding party introduced themselves, and they informed the said two persons that as per their information, both of them have got charas, and therefore, they are required to be searched in the presence of the panchas. When they asked about their willingness of being searched in the presence of the Magistrate or before the gazetted officer, they said that they were not willing to be searched either in the presence of the Magistrate or before the gazetted officer. Thereupon, both of them were searched on the spot. During search, from the cloth bag of A-1, 28 pieces of charas wrapped in paper were found. On smelling the said substance it was found as charas, and weighing 259 gms. From A-2, 19 pieces of charas from the

cloth bag wrapped in paper were found. On smelling the said substance, it was found as charas and weighing 189 gms. On inquiry being made with regard to pass or permit, both of them had no pass or permit to possess the charas. Thereafter, the said article charas was recovered as per the panchnama by putting it in a separate cardboard box. A paper-slip of the panchas and Commissioner of Police, Rajkot was affixed thereon and both the accused were arrested for commission of the offences punishable under Section 20 read with Section 29 of the NDPS Act, and accordingly, second part of the panchnama was prepared, and B.A.Tewari, P.I. sent the said information to City 'B' Division Police Station, Rajkot.

2.2 On the basis of the aforesaid information, a complaint was filed by B.A.Tewari, P.I. in City 'B' Division Police Station, Rajkot against both the accused for commission of the offences under Section 20 read with Section 29 of the NDPS Act. The said complaint was registered in the Police Station and the muddamal articles (both the sealed bags) were accepted by P.S.O. of the said police station and both the accused were arrested. Seal of Inspector, Rajkot was also affixed. Thereafter, B.A.Tewari, P.I. also made entry in the police station diary.

2.3 During the course of the further investigation and interrogation of A-1, he has shown his willingness to show additional quantity of charas which was concealed by him, and therefore, panchas were called, and they prepared the first part of panchnama under the provisions of Section 27 of the Indian Evidence Act. Thereafter, as per the description of the place given by A-1, all police personnel together with panchas and A-1 went near Tata Motor Garage, Kuvadva road. From the Western wall of the said garage, he has shown 17 pieces of charas weighing 163 gms. The said pieces of charas were also recovered under panchnama, and accordingly, second part of the panchnama was prepared, and the said muddamal article was also entrusted to the P.S.O., Rajkot City 'B' Division Police Station.

2.4 After the recovery of the muddamal article from the bags of A-1 and A-2 as well as muddamal article which was recovered lateron at the instance of A-1, were sent to FSL, Junagadh for chemical analysis through Head Constable Shantilal Borisagar. Thereafter, statements of both the accused were recorded. On receipt of the report of the FSL certifying the said muddamal article as charas, and on the basis of the evidence collected

against the accused, chargesheet was filed against the accused for commission of the offence under Section 20 read with Section 29 of the NDPS Act in the Sessions Court of Rajkot.

2.5 The learned Additional Sessions Judge, Rajkot framed charge at Exhibit-1 for commission of the offences under Section 20 read with Section 29 of the NDPS Act. The charge was read over and explained to the accused, to which they pleaded not guilty and claimed to be tried.

2.6 To prove the culpability of the accused, the prosecution has examined in all 9 witnesses, and also produced documents, upon which heavy reliance was placed by the prosecution. After recording of the prosecution witnesses was over, the learned Judge explained to the accused, circumstances appearing against them in deposition of the witnesses. Thereafter further statement of the accused were recorded under Section 313 of the Code. In further statement also, accused denied the prosecution case, however, they did not lead any evidence in their defence nor they examined themselves on oath.

2.7 On appreciation, evaluation and analysis of the prosecution witnesses, the learned Judge has disbelieved the case of the prosecution on the following premise:

(i) The panch witnesses of both the panchnamas have not supported the recovery of the contraband article charas from the accused.

(ii) The seal which was affixed on the contraband article charas was not of the same facsimile (specimen) which was sent separately to the FSL, and as a result thereof it has become doubtful that the FSL has examined the same contraband article charas.

(iii) Non-observance and noncompliance of the mandatory provisions contained under Sections 42, 50 and 57 of the NDPS Act.

On the aforesaid premise, it was held that evidence of P.I. cannot be relied upon to connect the accused with the alleged crime, and therefore, the prosecution failed to prove charge levelled against the accused. Resultantly, the learned Trial Judge acquitted the accused of the offences with which they were charged, which has given rise to the present appeal.

3. Ms. B.R.Gajjar, learned APP for the Appellant-State has taken us through the entire testimonial collections. It is submitted by her that while acquitting the accused, the learned Judge has misinterpreted the provisions contained under Sections 42, 50 and 57 of the NDPS Act. According to her, there is ample evidence with regard to the compliance of the said provisions during search, seizure and arrest of the accused. According to her, though the panch witnesses of both the panchnamas have not supported the evidence with regard to the recovery of the alleged contraband article charas, that by itself is not the ground to discard the prosecution case in totality. According to her, in the presence of B.A.Tewari, P.I., who is the complainant as well as member of the raiding party, contraband articles were recovered from the accused, therefore, there is no reason to disbelieve his evidence as he has complied with all the statutory provisions contained under the NDPS Act, and therefore, the whole matter is required to be reconsidered by this Court by reappreciating the evidence. Therefore, according to her, impugned judgement and order of acquittal is required to be quashed and set aside by allowing this appeal, and thereby, to convict the accused of the offences with which they were charged.

4. While admitting the appeal on March 21, 1995, non-bailable warrants came to be issued against the accused. Pursuant to the same both were arrested and released on bail by this Court vide order dated August 21, 1995 rendered in Misc. Criminal Application No. 2762 of 1995 and order dated May 1, 1995 rendered in Criminal Misc. Application No. 1535 of 1995 respectively on the terms and conditions contained therein. At the time of hearing of this appeal, A-1 elected to remain absent whereas A-2 has appeared through his Advocate Mr. Nitin M. Amin.

5. Mr. Nitin M. Amin, learned advocate for A-2 has supported the impugned judgement and order through out, and according to him, no infirmity is found in the impugned judgement and order, and as, there is nonobservance and noncompliance of the statutory provisions contained under the NDPS Act, which is a fatal to the prosecution case. Besides this, it is also emphasised by him that this is an acquittal appeal where the scope and ambit of this Court to reappreciate, reanalyse ad reevaluate the evidence is very limited. This Court can interfere only if the impugned judgement and order of the lower Court is palpably wrong, manifestly erroneous and demonstrably unsustainable.

According to him, this judgement is neither palpably wrong nor manifestly erroneous or demonstrably unsustainable, and therefore, according to him, this appeal lacks merit, deserves to be dismissed, and thereby the impugned judgement and order acquitting the accused is required to be confirmed by this Court. He, therefore, urged to dismiss the appeal.

6. We have considered the submissions advanced by the learned advocates appearing for both the parties. We have perused the impugned judgement and order as well as testimonial collections and record and proceedings of the Sessions Case No. 356 of 1993 which have been called for by this Court. We have also considered the latest reported decision of the Supreme Court with regard to the statutory provisions contained under the NDPS Act.

7. Adverting to the oral testimony of Balkeshwar Prasad Awadhbihari Tewari, PW-9 at Exhibit-40, who is the complainant as well as investigating officer, it is seen that he has narrated the entire case of the prosecution in verbatim. The manner in which he received information, called the panchas, arranged for trapping of the accused in presence of the panchas as well as police personnel, recovered muddamal article charas from the accused and additional muddamal article charas from A-1, by making a panchnama under Section 27 of the Indian Evidence Act, filed the complaint, sealed muddamal was sent to the P.S.O., who sent it to FSL through Police Head Constable Shantilal Borisagar and filed the chargesheet. From his oral testimony as well as documentary evidence, i.e., complaint and panchnama, we have noticed about nonobservance and noncompliance of statutory provisions contained under Section 42 of the NDPS Act by him. In para 21 of his cross-examination, he has candidly admitted that he has not entered the information which he has received in Police Station diary of Pradyuman Nagar Police Station or Rajkot City 'B' Division Police Station. He has reiterated that he has not entered the said information prior to filing of the complaint of the alleged offence in Rajkot City 'B' Division Police Station. In his cross-examination, he has further admitted in para 28 that prior to raid, they were certain that they proceeded for raid under the NDPS Act on the basis of the information received.

8. In view of the aforesaid clear admission of B.A.Tewari, Police Inspector-cum-Investigating Officer, he has not observed or complied with the statutory provisions contained under Section 42 of the NDPS Act.

9. In the case of STATE OF PUNJAB V. BALBIR SINGH, (1994) 3 SCC 299, Supreme Court, in para 14, has said that 'However, if such information is given by any person, the same should be taken in writing as provided both under Section 41(2) and 42(1)'.

10. Admittedly, B.A.Tewari, P.I., is an officer under Section 41(2) of the NDPS Act as he was a gazetted officer. In view of the settled principle elucidated by the Supreme Court in the above referred to judgement, though B.A.Tewari, P.I. was an officer under Section 41(2) of the NDPS Act, he was duty bound to take the said information in writing as contemplated under Section 41(2) of the NDPS Act.

11. In the case of ABDUL RASHID IBRAHIM MANSURI V. STATE OF GUJARAT, AIR 2000 SC 821, a raid was carried out by the P.I. on the basis of the prior information received by him. Supreme Court, while interpreting Section 42 of the NDPS Act has said that "In the instant case, Police Officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substance. When he was asked in cross-examination whether he had taken down the information in writing he had answered in negative. Nor did he even apprise his superior officer of any such information either then or later, much less sending a copy of the information to the superior officer. Police Officer admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act, and not under Section 43 as per which he was not obliged to take down the information and hence he cannot wriggle out of the conditions stipulated in the said sub-section and there was noncompliance with Section 42 of the Act."

Supreme Court, with the aforesaid finding allowed the appeal and set aside the conviction and sentence passed on the appellant by the High Court in the impugned judgement before it by restoring the order of acquittal passed by the Trial Court.

12. Applying the principle laid down by the Supreme Court in above referred to judgement to the facts of the present case, at the cost of repetition, be it stated that since B.A.Tewari, P.I., who is the complainant as well as the Investigating Officer, has not observed or complied with the statutory provisions contained under Section 42 of the NDPS Act by not taking down the information in writing which he had received as per the

admission made by him in his cross-examination, the accused are entitled to avail the benefit of the said provisions.

13. In view of the aforesaid state of affairs and having regard to the nature of the evidence of B.A.Tewari, P.I., who has not observed or complied with the statutory provisions contained under Section 42 of the NDPS Act, it cannot be said that the learned Judge has committed any error in acquitting the accused for the offences with which they were charged.

14. In the case of RAM KUMAR V. STATE OF HARYANA, AIR 1995 SC 280, Supreme Court has held that "powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

15. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents/accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Trial Judge.

16. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgement and order of acquittal which is impugned under Appeal.

17. For the foregoing reasons, Appeal fails and accordingly it is dismissed. As the respondents/accused are on bail, their bail bonds shall stand cancelled and sureties are discharged. While releasing the A-1 on

bail, this Court has directed him to deposit Rs.5000/- in cash with the registry. If the said amount is deposited by the A-1 in the registry, the registry is directed to refund the said amount together with interest accrued thereon, if any, to the A-1, upon due verification.

(A.M.Kapadia,J)

(H.H.Mehta,J)

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